RECORD AND BRIEFS

No. 16-111

IN THE SUPREME COURT OF THE UNITED STATES

MASTERPIECE CAKESHOP, LTD., and JACK C. PHILLIPS,

PETITIONERS

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG and DAVID MULLINS,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONER SEEKING REVERSAL

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INTEREST OF AMICUS[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious liberty, the sanctity of human life, and marriage and the family. Liberty Counsel is committed to upholding the historical understanding and protection of the rights to free speech and free exercise of religion, and to ensuring that those rights remain an integral part of our legal protections.

Liberty Counsel has represented countless individuals and organizations whose free exercise and free speech rights have been violated, and has developed a substantial body

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondent Colorado Civil Rights Commission have filed blanket consents to the filing of Amicus Briefs in favor of either party or no party. Respondents Charlie Craig and David Mullins have consented to the filing of this Brief and their written consent is being filed simultaneously with the Brief.

of information related to the history, ubiquity and importance of these rights to maintaining the fabric of freedom in the nation.

Amicus is particularly concerned about the deleterious effects of the aggressive use of "non-discrimination" laws on free exercise rights of faith-based individuals and business owners such as Petitioner Phillips and wishes to provide this Court with information on how the misuse of such laws undermines this Court's long-standing precedents on the primacy of free exercise rights. Amicus respectfully submits this Brief to assist this Court in evaluating Petitioners' Free Exercise claim.

SUMMARY OF ARGUMENT

This is only one of numerous cases across the country in which free exercise rights of private business owners are being threatened by over-zealous state actors using "non-discrimination" laws with expansive definitions of "public accommodations" to compel the owners to choose between violating their religious beliefs by commemorating same-sex "marriages" or suffering financial penalties or even the loss of their livelihoods. *See e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert denied*, 134 S.Ct. 1787 (2014); *State v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017),

petition for cert. filed (U.S. July 14, 2017) (No. 17-108); *Klein v. Oregon Bureau of Labor and Industry*, No. CA A159899 (Ore Ct. App. April 25, 2016).

Non-discrimination laws which were enacted to remedy racially discriminatory policies in restaurants, hotels, service stations and other businesses affecting the ability to travel and conduct business have been re-configured into regulatory hammers. Using these hammers, state actors such as the Colorado Civil Rights Commission ("CRC") have taken aim at businesses such as Masterpiece Cakeshop which operate in accordance with the owners' sincerely held religious beliefs that forbid the celebration of marriage as anything but the union of one man and one woman. Business owners such as Mr. Phillips who provide products and services to homosexuals as they do to others but who decline to provide services to commemorate the union of two people of the same-sex are punished for "discrimination" and forced to either violate their beliefs or effectively go out of business.

This misuse of non-discrimination laws to punish sincerely held religious beliefs is antithetical to the foundational principles of the Free Exercise clause and undermines the

legitimate remedial purposes of public accommodation/non-discrimination laws.

LEGAL ARGUMENT

I. THE STATE VIOLATED FREE EXERCISE RIGHTS BY COMPELLING PETITIONERS TO PARTICIPATE IN AND PROMOTE A SAME-SEX UNION CEREMONY WITH NO EFFORT TO ACCOMMODATE SINCERELY-HELD RELIGIOUS BELIEFS.

Petitioner Phillips has been warned that he must check his constitutional rights at the door to Masterpiece Cakeshop if he wants to remain in business. According to the CRC, the price of Mr. Phillips continuing to operate his bakery is the surrendering of his sincerely held religious beliefs to unquestioningly celebrate same-sex unions as "marriages."

This Court has unequivocally said that the state cannot put business owners, or employees, to such a Hobson's choice. *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014); *Thomas v. Review Board*, 450 U.S. 707 (1981). Colorado cannot "in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal

place in the civil community." *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring). Yet that is precisely what Colorado is attempting to do.

A. Petitioners Are Being Forced To Sacrifice Their Free Exercise Rights To Satisfy The State's Demand That Business Owners Participate In Same-Sex Ceremonies.

As was true of the Petitioners in *Hobby Lobby*, Petitioner Phillips here has deemed it necessary to exercise his religious beliefs within the context of his own closely held, for-profit corporation, a context that this Court confirmed is appropriate. 134 S.Ct. at 2769, 2785. "No person may be restricted or demeaned by government in exercising his or her religion." *Id.* at 2786 (Kennedy, J. concurring).

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious

> precepts. Free exercise in this sense implicates more than just freedom of belief. *See Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Id. at 2785. As the majority said, furthering the religious freedom of for-profit, closely held businesses also "furthers individual religious freedom." *Id.* at 2769.

As Colorado's CRC has done here, the U.S. Department of Health and Human Services (HHS) in *Hobby Lobby* argued that if merchants choose to incorporate their businesses—without in any way changing the size or nature of their businesses—they forfeit all free-exercise rights. *Id.* at 2767. "HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations." *Id.* This Court soundly rejected that argument in *Hobby Lobby* and should similarly reject it here.

In the words of Justice Kennedy, freedom means that Mr. Phillips has the right to believe in a divine creator and a divine law and free exercise is essential in preserving his dignity and in striving for a self-definition shaped by his religious precepts. *See id.* at 2785. Free exercise means the right to express those beliefs and to establish his religious self-definition in the political, civic, and economic life of his larger community through Masterpiece Cakeshop. Colorado's actions are infringing that freedom in a way that threatens to chill religious free exercise for many religious adherents in the state.

B. The State Is Impermissibly Treating Religious Freedom As A Personal Preference That Can Be Swept Aside For Convenience Instead Of An Independent Liberty Occupying A Preferred Position.

The CRC's draconian actions against Mr. Phillips evidence a view of religious free exercise as merely a personal preference that must yield to the state's purpose of compelling the celebration of same-sex unions as "marriages." That perspective not only demeans Mr. Phillips' religious beliefs but also

contravenes this Court's recognition that "an individual's free exercise of religion is a preferred constitutional activity." *Employment Division v. Smith*, 494 U.S. at 902 (O'Connor, J. concurring). It is not merely a personal inclination that can be adjusted to comply with a governmental directive such as making a wedding cake for two people whom the baker believes cannot enter into a marriage.

Instead, the First Amendment commands that "religious liberty is an independent liberty, that it occupies a preferred position...." *Id.* at 895. At the time of the founding, "[f]reedom of religion was universally said to be an unalienable right; the status of other rights commonly found in state bills of rights, such as property or trial by jury, was more disputed and often considered derivative of civil society."[2]

> Indeed, the evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the "universal sovereign" precede the claims of civil society, both in time and in authority, and that when the people vested power

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[2] Michael W. McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 HARV. L. REV. 1409, 1456 (1990).

> in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by nature and scope of religious duty. A religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible.[3]

Madison further stated that the free exercise right should prevail "in every case where it does not trespass on private rights or the public peace."[4] "This indicates that a believer has no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side."[5] However, when the rights of others are not

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[3] *Id.* at 1512.

[4] *Id.* at 1464, quoting *Letter from James Madison to Edward Livingston* (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON, 98, 100 (G. Hunt ed. 1901).

[5] *Id.*

involved, then "the free exercise right prevails."[6] In other words, the state can act to protect the public peace and safety, but it must "respect the right of the believer to weigh spiritual costs without governmental interference."[7]

The CRC's application of Colorado's Anti-Discrimination Act ("ADA") to compel a baker to surrender his sincerely held religious belief that marriage is defined only as the union of one man and one woman and celebrate same-sex unions as "marriages" far exceeds these constitutional boundaries. Mr. Phillips' declination of Mr. Craig's and Mr. Mullin's request for service did not trespass on their private right to engage in a wedding ceremony or even to have a cake. Mr. Phillips' actions did not disturb the public peace. Consequently, Mr. Phillips' free exercise rights should have been the prevailing consideration, not a preference to be punished. Mr. Phillips' religious duty to adhere to commemorating only the union of one man and one woman as a marriage did not cease to be a duty because the State of Colorado says that same-sex couples can "marry." Nor did his duty cease because the state broadly construes its ADA to claim that a private business is a "public accommodation" and that

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6 *Id.*

7 *Id.*

if such "public accommodation" declines to bake a wedding cake but will sell other goods to a same-sex couple, then it constitutes "discrimination" on the basis of "sexual orientation."

C. The Operational Effect Of Colorado's ADA Is To Disparage Those Whose Religious Beliefs Forbid Them From Promoting Or Celebrating Same-sex Unions As "Marriages."

The CRC here has done what this Court specifically stated it was not doing when it said same-sex couples could "marry," *i.e.*, disparaging people like Mr. Phillips "who deem same-sex marriage to be wrong ... based on decent and honorable religious or philosophical premises." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015). The *Obergefell* majority acknowledged the continuing need to protect the First Amendment rights of those like Mr. Phillips whose religious beliefs prohibit condoning same-sex "marriage." *Id.* at 2607.

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be

> condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

l Id. As this case demonstrates, and Chief Justice Roberts predicted, that promise of continued protection for those advocating that marriage is solely the union of one man and one woman has proven to be illusory. As Mr. Phillips has found, "[u]nfortunately, people of faith can take no comfort in the treatment they receive from the majority today." *Id.* at 2626 (Roberts, C.J. dissenting). The First Amendment guarantees the freedom to "exercise" religion, not merely "advocate and teach religious principles." *Id.* As this case illustrates, the difference is significant.

The CRC's draconian sanctions against Petitioners are the embodiment of Justice Alito's prediction that the *Obergefell* decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy." *Id.* at 2642 (Alito, J., dissenting).

> In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African–Americans and women. [citation omitted]. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Id.

That is precisely what has occurred with the CRC. As the record reveals, the Commission found no actionable discrimination against three bakeries that refused a Christian customer's request to make two cakes, one portraying two groomsmen with a red "X" superimposed with Bible verses stating that God loves sinners and another in the shape of a Bible featuring two verses stating that homosexual conduct is a sin. (Pet. App. 297a-325a). The Commission upheld the CRC director's determination that there was insufficient evidence that the bakeries were discriminating. (Pet. App. 326a-331a). However, when Respondents Craig and Mullins complained that Mr. Phillips declined to create a cake celebrating a same-sex "wedding" because it violated his religious belief that marriage is the union of one man and one woman, the Commission found ample evidence

of discrimination. The only relevant difference between the two scenarios is that in the first scenario the bakeries were willing to adhere to the "new orthodoxy" by refusing to promote an anti-same sex "marriage" message while in the second Mr. Phillips was unwilling to adhere to the new orthodoxy and was summarily punished.

This evidences the kind of government hostility toward the activities of religious adherents that his Court has consistently rejected, including last term in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The Free Exercise Clause "guarantees the free exercise of religion, not just the right to inward belief (or status). *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." *Id.* at 2026 (Gorsuch, J., concurring). "And this Court has long explained that government may not 'devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.' *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)." *Id.* Instead, the *Lukumi* court said,

> [T]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for

> state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular.

Church of Lukumi, 508 U.S. at 547. The CRC has not only failed to be resolute in resisting actions that are hostile to religion, but has itself engaged in the hostile acts through the mechanism of the ADA. It has devised a means of interpreting "public accommodation" and "discrimination" so that those like Mr. Phillips whose religious beliefs prohibit the recognition of same-sex unions as "marriages" are oppressed while those, like the other bakery referenced in the record, which refuse to sponsor a message opposing same-sex marriage, are not.

Any doubt about the underlying hostility of the CRC to the religious beliefs of Petitioners is erased by the comments of one of the commission members:

> I would also like to reiterate what we said in the hearing or the last

> meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we –we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others.

(Pet. App. 211a-212a).

Colorado's actions against Petitioner are textbook examples of what Chief Justice Roberts and Justice Alito warned against in their *Obergefell* dissents. If the rights of conscience referenced by the *Obergefell* majority are to have any meaning, then this Court should reverse the lower court's action and invalidate the CRC's ruling.

II. THE STATE IS USING ITS LAW AS A CLUB TO CHILL RELIGIOUS FREE EXERCISE OF THOSE WHO REFUSE TO PARTICIPATE IN SAME-SEX CEREMONIES.

Colorado is using its anti-discrimination law to create substantial burdens on religious free exercise instead of to protect against

impermissible discrimination in true places of public accommodation. It far different to compel a privately owned bakery to make a wedding cake for a same-sex couple than it is to compel a motel owner located along the interstate to provide rooms and meals for African-Americans as well as whites. The non-discrimination laws enacted for "public accommodations" were put in place for the latter purpose to counteract the effects of essential services being denied to African-Americans in a way that prevented them from effectively using interstate highways and other public modes of transportation. Colorado and other states, however, are using them to create "discrimination" where none exists and then use that faux discrimination to justify burdening religious free exercise.

By expanding the definition of "public accommodation" to include virtually every business, states such as Colorado, New Mexico and Washington have converted a shield against discrimination into a sledgehammer to punish business owners who do not abandon their First Amendment rights to proclaim the state's message. Community-based wedding cake bakers, photographers and florists whose services are discretionary have been placed under the same regulatory mandates as those who provide food, fuel and shelter essential to survival. Those mandates, in turn, have been

expanded from prohibiting the denial of service on the basis of status to prohibiting the message that marriage can only be the union of one man and one woman.

The cumulative effect of the expansive definition of "public accommodation" and expansive interpretation of "discrimination" is a Hobson's choice of surrendering religious beliefs regarding marriage as the union of one man and one woman or continuing to operate a business. Just as the New Mexico court did to Elane Photography and the Washington court did to Arlene's Flowers, the CRC and Colorado Court of Appeals here have given Petitioners an ultimatum—your free exercise rights or your business. It is an ultimatum that this Court has repeatedly determined is impermissible under the Constitution.

A. The State Has Impermissibly Expanded The Definition Of "Public Accommodation So That The Law Is A Source Of Instead Of A Remedy For Discrimination.

Laws prohibiting discrimination in "public accommodations" were aimed at preventing businesses with a virtual monopoly on essential services, *e.g.*, utilities, hotels, restaurants, from denying access on the basis

of impermissible classifications. As this Court explained:

> At common law, innkeepers, smiths, and others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer. [citations omitted]. As one of the 19th-century English judges put it, the rule was that "[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng.Rep. 94, 96 (N.P.1835); *M. Konvitz & T. Leskes, A Century of Civil Rights* 160 (1961).

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 571 (1995). After the Civil War many states enacted such laws to deal specifically with ongoing racial segregation and denial of service to African-Americans in, *e.g.*, "any licensed inn, in any public place of amusement, public conveyance or public

meeting." *Id.* Colorado's ADA[8] is an example of such laws adopted prior to adoption of Title II of the Civil Rights Act of 1964.[9] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, (1984). The statutes provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Act was adopted. *Id.* The fundamental object of these laws and of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to *public establishments*." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S.Rep.No.88-872, at 15-16 (1964)) (emphasis added).

In keeping with the stated purpose of preventing discrimination in *public establishments*, Title II narrowly defines "public accommodation."

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

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8 Colo. Rev. Stat. §24-34-301 *et seq.*,

9 42 U.S.C. §20000a

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered

> establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. §2000a(b). This narrow definition was Congress' reasoned response to the actual problem needing resolution, *i.e.*, the denial of access to essential services such as food, shelter and fuel on the basis of race. The Act worked "to impose duties of nondiscrimination on parties with monopoly power over relatively commoditized goods and services."[10] At the time the Act was adopted, "a combination of public abuse of essential facilities and private violence posed a mortal threat to the individual liberties of vulnerable citizens, often on grounds of race."[11] Passage of the Act meant that people could not be kept out of railroads and off the electrical grid, but it also allowed all private groups to select their own members and govern their own organizations when they provided uniquely differentiated services in competitive markets.[12] Thus, it struck a balance between preventing discrimination and

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10 Richard A. Epstein, *Public Accommodations Under The Civil Rights Act Of 1964: Why Freedom Of Association Counts As A Human Right*, 66 STAN. L. REV. 1241, 1290 (2014).

11 *Id.*

12 *Id.*

protecting the individual liberties of business owners and organizations.

However, as this case demonstrates, that balance has shifted as states and municipalities have expanded the definition of "public accommodation" to include virtually any business that sells products or services to the public. "Current state public accommodation laws have cast off their historical roots and embrace a wide range of business activity."[13] For example, as this Court noted in *Boy Scouts of America v. Dale*, 530 U.S. 640, 657 (2000), New Jersey defines "public accommodation' to include more than 50 types of places. In addition, the law has a "catch-all" provision which encompasses "any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind."[14]

Colorado's definition is similarly expansive:

> As used in this part 6, "place of public accommodation" means any place of business engaged in any

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[13] James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim At First Amendment Freedom Of Speech*, 64 VAND. L. REV. 961, 967 (2011).

[14] *Id.*

sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.

Colo. Rev. Stat. Ann. §24-34-601(1).

New Mexico's Human Rights Act ("NMHRA") also broadly defines "public accommodation" as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private." *Elane Photography*, 309 P.3d at 59. Under that definition, a family-owned photography studio constitutes a "public accommodation" that can be liable for declining to photograph a same-sex ceremony. *Id.*

The State of Washington, like Colorado, has adopted a sweeping definition of "public accommodation" that encompasses virtually every business in the state, including a flower shop owned by a local grandmother. *Arlene's Flowers*, 389 P.3d at 556.

> (2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging

of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's

> camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

Wash. Rev. Code §49.60.040(2).

Consequently, instead of seeking to remedy discrimination in businesses offering essential services to the public, Colorado, New Mexico and Washington, *inter alia*, are manipulating the concept of "public accommodation" to impose their vision of "marriage equality" on virtually everyone who does business in the state. As this Court recognized, such expansive definitions increase "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations." *Dale*, 530 U.S. at 657. "Indeed, the more broadly these

laws are written, the larger the shadow they cast over First Amendment free speech,"[15] and concomitantly, free exercise, rights.

That is borne out in this case, where Petitioners face draconian regulatory oversight designed to squelch their sincerely held religious beliefs that marriage is only the union of one man and one woman. The conflict is also apparent in New Mexico's determination that a wedding photographer is guilty of discrimination for declining to commemorate a same-sex union as "marriage" in violation of her religious beliefs. *Elane Photography*, 309 P.3d at 69-70. The conflict is even more apparent in *Arlene's Flowers*, where the Supreme Court of Washington explicitly rejected the concept of balancing free exercise rights with the requirement to celebrate same-sex "marriage." 389 P.3d at 555-56. These decisions illustrate how expansive definitions of "public accommodations" such as in Colorado's ADA do not increase, but actually threaten, diversity in the marketplace.

> It allows the state to impose nondiscrimination obligations on weak and powerless individuals, institutions, and firms that only wish to be left alone. It then compounds the mischief by

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[15] *Id.* at 968.

> insisting that its key control over basic public facilities allows it to impose its will on private institutions that are powerless to resist its combination of direct controls and fines. It is indeed a sorry state of affairs that a great norm intended to blunt private power has now become a tool to allow all-too-powerful institutions to stamp out those groups that oppose their vision of the good society.[16]

Colorado's manipulation of the concept of "public accommodations" has tilted the scale away from remedying injustice toward restricting liberty. The CRC has shifted the focus from protecting disadvantaged minorities seeking food and shelter to punishing business owners trying to provide goods and services in a manner that does not violate their sincerely held religious beliefs.

The punitive consequences of the CRC's application of the ADA to Petitioners demonstrate that the expansive definition of "public accommodation" should be jettisoned in favor of a more narrow definition that protects First Amendment freedoms while preventing disparate treatment in essential services. All-

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[16] Epstein at 1290-91.

encompassing definitions such as Colorado's and Washington's have made the concept of "public accommodation" meaningless as a limiting principle. Returning to a more narrow definition that focuses on businesses that provide services essential for health and safety would bring the laws back in concert with the original purpose of preserving human dignity by ensuring access to *public establishments*. *Heart of Atlanta Motel*, 379 U.S. at 250 (emphasis added). This Court should reject Colorado's expansion of "public accommodation" by reversing the CRC and court of appeals decisions that relied upon that decision to punish Petitioners.

B. The CRC Improperly Broadened "Discrimination" To Include Refusing To Promote A Particular Message.

Building upon the legislature's enlargement of what constitutes a "public accommodation," the CRC broadened the concept of "discrimination" to encompass not just disparate treatment based upon status but also failure to unquestioningly commemorate same-sex "marriages." As a result, business owners who do not deny service to same-sex couples are nonetheless found to have discriminated on the basis of "sexual

orientation" if they decline to provide services to celebrate a same-sex "wedding," even if they decline based on sincerely held religious beliefs that prohibit communicating such a message. App. 45a. *See also, Elane Photography,* 309 P.3d at 62-63; *Arlene's Flowers,* 389 P.3d at 554-56. In other words, Colorado and its sister states insist First Amendment rights take a back seat to the newly minted right to same-sex "marriage," even if that means redefining "discrimination" to mean not merely denying service but refusing to promote the state's message. That stretching of the concept of discrimination not only defies logic, but also contradicts this Court's precedents. The fact that Colorado is only one of several states that have so manipulated the concept of discrimination points to the need for this Court to reject the lower court's decision and emphasize the preferred status of free exercise rights.

As the court of appeals acknowledged, Mr. Phillips is willing to sell products to homosexual or lesbian customers, including birthday cakes, cookies, and other non-wedding cake products. (App. at 19a). Mr. Phillips declined to prepare a wedding cake for Mr. Craig and Mr. Mullins, not because of their sexual orientation, but because of his religious beliefs that provide that marriage is only the union of one man and one woman. (Pet. App. at

20a). Nevertheless, the court determined that Mr. Phillips "discriminated" against Mr. Craig and Mr. Mullins because being against commemorating same-sex unions as "marriages" is "tantamount" to refusing to sell products based on the customer's sexual orientation. (*Id.*).

Similarly, the New Mexico Supreme Court found that Elane Photography had "discriminated" against Ms. Willock on the basis of her sexual orientation despite the fact that Elane Photography said it was willing to take portrait photographs or other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings. *Elane Photography*, 309 P.3d at 61. The photographer, like the baker here, made it clear that the objection was to endorsing as a marriage anything but a union of one man and one woman. *Id.* Notably, Elane Photography's owner said that she would have declined to photograph heterosexual actors playing the role of a same-sex couple getting "married." *Id.*

In *Arlene's Flowers*, the florist had done thousands of dollars of business with the complainant for at least nine years knowing that he was homosexual and in a relationship with another man. 389 P.3d at 549. The florist turned down her customer's request to provide

flowers for his "wedding" because of her sincerely held religious beliefs that marriage can only exist between one man and one woman. *Id.* She provided her customer with the names of other florists who could help him. *Id.* Nevertheless, the Washington Supreme Court found that Arlene's Flowers had discriminated against the client because of his sexual orientation.

In each of these cases, as was true of the State of New Jersey in *Dale*, the state certainly has a compelling interest in eliminating discrimination in public accommodations. *Dale*, 530 U.S. at 657. However, that interest does not absolve the state of its duty to protect the constitutional rights of all of its citizens, including the free exercise rights of business owners. *See, id.* at 659 (finding that the state's interest in eliminating discrimination against homosexuals did not justify violating the First Amendment rights of a private organization (the Boy Scouts)). This Court found that the state's requirement that the Boy Scouts accept a homosexual scoutmaster would substantially burden the organization's right to oppose or disfavor homosexual conduct within the organization. *Id.* "The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* "That being the case, we hold

that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law." *Id.* Notably, the majority stated that the fact that homosexuality might have become more socially acceptable since the Boy Scouts adopted the policy (as argued by Justice Stevens in his dissent) did not change the analysis. *Id.* at 660. "[T]his is scarcely an argument for denying First Amendment protection to those who refuse to accept these views." *Id.*

> The First Amendment protects expression, be it of the popular variety or not. And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.

Id. Mr. Phillips is one of those wishing to voice a different view of marriage than that being advocated by the CRC. His right to do so, especially when he is willing to provide non-wedding products to customers regardless of sexual orientation, should be protected, not punished as discrimination by the state.

As was true of the Massachusetts anti-discrimination law in *Hurley*, Colorado's ADA

is being "applied in a "peculiar way" by the CRC, and that peculiar application violates Petitioners' First Amendment rights. 515 U.S. at 572. The Massachusetts law, like the ADA here, began as a law prohibiting racial discrimination in inns, public conveyances, public meetings or places of amusement and was broadened to prohibit discrimination based upon sex, sexual orientation, creed, disability and other classifications. *Id.* at 571-72. As this Court said, such laws are reasonable responses to evidence that a given group is the target of discrimination. *Id.* at 572. As long as the focal point of the law remains prohibiting discrimination against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds, it does not violate the First or Fourteenth Amendments. *Id.* However, when the law is used to co-opt a business or organization's message in favor of the state's preferred message, then a constitutional violation occurs. *Id.* In *Hurley* the parade organizers did not exclude homosexual, lesbian or bisexual individuals from participating in the parade or as members of groups marching in the parade. *Id.* As is true with Mr. Phillips, the organizers disclaimed any intent to deny anyone access to its services (the parade) because of their sexual orientation or any other classification. *Id.*

What the parade organizers did do, as did Mr. Phillips here, is decline to promote the complainants' message. *Id.* Instead of seeking equal access to a public accommodation, *i.e.*, the parade, the complainants in *Hurley* sought to co-opt the organizers' message with their own message of "gay pride." *Id.* By applying the anti-discrimination law to the organizers' declination of the marchers' message, the state "produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572-73.

> Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

Id. at 573. Accepting the complainants' request "would at least bear witness to the fact that

some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics." *Id.* at 574. "The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade." *Id.* at 574-75. "But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575. Similarly here, the choice of Mr. Phillips not to celebrate same-sex unions as "marriages" lies beyond the CRC's power to control.

On its face, the object of Massachusetts law, like Colorado's ADA, "is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference." *Id.* at 578. However, when the law is applied not to a denial of service, but to declination of a

particular message, "its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.* at 578. That objective violates the speakers' First Amendment rights, whether the parade organizers in *Hurley*, or Mr. Phillips here. Just as the state's enforcement of the anti-discrimination law against the parade organizers violated their free speech rights, so to the CRC's enforcement of the ADA against Mr. Phillips violated his free exercise rights.

The *Hurley* court suggested that a broader objective might be behind the state's "peculiar" enforcement of the anti-discrimination law, an objective that the record here suggests underlies the CRC's decision. Under that broader objective, "the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases." *Id.*

> Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction.

Id. at 578-79. Examination of the record here reveals that the true motivation behind the CRC's decision was not to remedy a denial of services to Mr. Craig and Mr. Mullins, but to produce a baker who is free of "bias" against same-sex "marriage" whose preparation of wedding cakes would be at least neutral toward same-sex couples so that there would not be further need for correction. The terms of the CRC's order, including monitoring of future transactions, bears witness to this underlying motive. So too, does the CRC's dismissal of charges against bakers who declined to create cakes expressing a customer's Christian views against same-sex "marriage." Punishing Mr. Phillips for not making a cake promoting same-sex "marriage" and dismissing charges against the other bakers for refusing to make a cake opposing same-sex "marriage" meets the objective of eliminating bias and ensuring at least neutrality on the issue. However, as the *Hurley* court said, such an objective is fatally flawed. *Id.* at 579.

The effect of the CRC's "peculiar" enforcement of Colorado's ADA against business owners who do not deny service to homosexual and lesbians, but who decline to celebrate their unions as "marriages" is to elevate the newly minted right to same-sex "marriage" to a preferred position over the constitutionally guaranteed rights of free

speech and free exercise of religion. In other words, sincerely held religious beliefs must yield to the pre-eminent goal of "eradicating sexual orientation discrimination." *See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (describing discrimination based on sexual orientation as "a grave evil that damages society as well as its immediate victims," justifying burdening of religious freedom). According to the CRC, and similar agencies in New Mexico and Washington, "the injury to one person, in the form of a burdened constitutional right, is preferred to the injury to the other, in the form of violations of statutory protections."[17]

As the comments of one commissioner make clear, the CRC has fully embraced this idea that religious beliefs must take a back seat to eliminating what it views as discrimination based on sexual orientation, because religious freedom is just an excuse to justify hurting other people. (App. 211a-212a). Beyond that, the CRC is saying that religious beliefs must

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[17] Sarah Jackson, *The Unaccommodating Nature Of Accommodations Laws: Why Narrowly Tailored Exemptions To Antidiscrimination Statutes Make For A More Inclusive Society*, 68 ALA. L. REV. 855, 873-74 (2017).

yield even when there is no evidence of actual discrimination, but just failure to compromise those beliefs to promote the state's message regarding same-sex "marriage." "In other words, when someone enters the business world, he has given up his constitutional right to protection for his religious liberty."[18]

Not according to this Court's precedents. Nevertheless, the CRC has burdened Petitioners with that untenable dilemma because of its expressed hostility toward Petitioners' religious beliefs. The CRC was so zealous to punish Petitioners for their religious beliefs that it concocted a new definition for discrimination to include failure to commemorate a same-sex "marriage." Even providing a full panoply of non-wedding cake bakery services to same-sex couples cannot protect Petitioners from the "discrimination" label if they will not surrender their belief that marriage is only the union of one man and one woman.

This Court should reverse the lower court's decision upholding the CRC's decision based upon its concocted definition of discrimination and expansive definition of "public accommodation" and restore the proper balance between cherished constitutional

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18 *Id.* at 874.

guarantees and recently established statutory rights. The fact that other vendors are suffering similar fates in New Mexico, Washington, Oregon, and other states points to the ubiquity of the problem and the need for this Court's decisive guidance.

CONCLUSION

Petitioners' good faith belief that marriage can only be the union of one man and one woman is based on decent and honorable premises that this Court has said should continue to be protected. *Obergefell*, 135 S.Ct. at 2602. This Court said it was not disparaging individuals such as Petitioners or their beliefs when it said that same-sex couples should be permitted to "marry." *Id.* The same cannot be said for the CRC. The commission has explicitly acknowledged that it is disparaging Petitioners' religious beliefs because they interfere with the commission's message that all businesses are "public accommodations" that must celebrate same-sex "marriages" without question or be guilty of "discrimination."

As predicted by Chief Justice Roberts, Justice Alito and Justice Thomas, religious free exercise has been relegated to second class status in order to accommodate state demands of unquestioned acceptance and celebration of

same-sex "marriage." That impermissible diminution of foundational First Amendment rights contradicts centuries of this Court's precedents, including last term's affirmation of the primacy of free exercise rights in *Trinity Lutheran*, 137 S. Ct. 2012.

This Court should restore free exercise rights to their proper preferred position by reversing the lower court's decision.

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